Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM 1977

NO. 77-1280

E. F. I., INC.

v.

M. I. I., A/K/A MARKETERS INTERNATIONAL, INC., ET AL

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

Petitioner, E.F.I., INC., prays that a Writ of Certiorari issue to review the orders of the Supreme Court of the State of Texas rendered on November 16, 1977 and December 14, 1977.

OPINIONS BELOW

The Texas Supreme Court affirmed the judgment of the Fourteenth Court of Civil Appeals of Texas by refusing Petitioner's Application for Writ of Error and Motion for Rehearing thereon without opinion. The Fourteenth Court of Civil Appeals of Texas affirmed in part, and reversed and rendered in part the trial court's judgment in favor of Petitioner herein and the said Court of

Civil Appeals' opinion is published at 550 S.W.2d 401. Such opinion and judgment appears at Appendix A and B respectively, at pp. A-1 through A-8; B-1, B-2.

JURISDICTION

Petitioners timely filed a Petition for Writ of Error to the Texas Supreme Court complaining of the actions of the Texas Fourteenth Court of Civil Appeals (App. C, pp. C-1, C-2). In such Petition for Writ of Error, federal questions were duly raised in Points of Error 3 and 4 (App. C, p. C-1).

The Texas Supreme Court refused Petitioner's Petition for Writ of Error without opinion on November 16, 1977 and on December 14, 1977 overruled Petitioner's Motion for Rehearing (App. D, p. D-2).

This Petition for Writ of Certiorari was filed within 90 days from the date of the overruling of Petitioner's Motion for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

The Texas Courts refused to enforce a debt in the amount of $27,269.80 for goods sold and shipped from Florida to other states (90% of such sales) and to Texas (10% of such sales). The basis for such refusal was a holding that the underlying agreement which produced the sales was void and unenforceable by virtue of the Texas anti-trust laws. The questions thereby arising are:

1. Whether the action of the State of Texas constituted an impermissible burden which materially affected interstate commerce.

2. Whether the action of the State of Texas was in contravention of the Supremacy clause of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article 1, Sec. 8:

"The Congress shall have Power . . . (T)o regulate Commerce . . . among the several States . . ."

Constitution of the United States, Article 6, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATEMENT OF FACTS

Petitioner is a Florida Corporation manufacturing electronic equipment on which it holds U. S. patents. Petitioner entered into an agreement with Respondent, a Texas Corporation, granting Respondent an exclusive distributorship for the sale of Petitioner's products for a nationwide area (including Texas). Petitioner sued Respondent for goods sold from Florida to all parts of the nation and the jury found that Respondent owed $27,269.80. It was further established that Respondent's resale of Petitioner's products were made directly from Florida and such sales were 90% to other states and 10% to Texas. The trial court entered judgment for Petitioner for $27,269.80 plus interest and costs. (App. A, p. A-5).

The Respondent appealed to the Texas Fourteenth Court of Civil Appeals which Court held that the agreement between the parties was void and unenforceable because it was in violation of the Texas anti-trust laws. The Court of Civil Appeals accordingly reversed and rendered the trial court judgment and decreed that Petitioners herein take nothing. (App. A, p. A-8).

The Court of Civil Appeals recognized that the sales of the products under the agreement in question were made 90% outside Texas and 10% in Texas and had a direct relation to interstate commerce. Notwithstanding such recognition, that Court still gave priority and effect to the Texas anti-trust laws.

Petitioners herein filed their Petition for Writ of Error to the Texas Supreme Court pointing out the improper burden on interstate commerce as enforced by the Court of Civil Appeals. (App. C, pp. C-1, C-2). The Texas Supreme Court refused such Petition without opinion. (App. D, p. D-1).

REASONS FOR GRANTING THE WRIT

1. By its decision, the Texas Supreme Court has promoted and imposed an unreasonable, impermissible, and unconstitutional burden on interstate commerce.

Granted that the Texas Courts have, by their action, affected interstate commerce (App. A, p. A-7), the next question is whether such action is unconstitutional. Such questions as this should not be decided by fixed metes and bounds of rules of law abstractly applied, but courts should examine closely the facts of each case to determine whether the dangers and hardships of diverse regulation justify

foreclosing a State from exercise of its powers; and what is within the exclusive federal authority may first have to be decided by this Court. *Colorado Anti-Discrimination Commission v. Continental Airlines,* 372 U.S. 714; *Amalgamated Clothing Workers of America v. Richman Bros.,* 348 U.S. 511.

The action (or nonaction) of the Texas Supreme Court cannot be squared with the provisions of the United States Constitution which gives to Congress the exclusive power to regulate interstate commerce to the exclusion of the States. *U. S. Const.,* Art. 1, Sec. 8; Art. 6, clause 2. The opinion below states that 10% of the sales in question were sales of Petitioner's products in Texas and 90% were made in other states and that *such had a direct relation to interstate commerce.* (App. A, p. A-7) (Emphasis added)

Under the Constitution and the countless cases that have been decided in this area, it is axiomatic that a state cannot be the source of action that imposes a burden which materially affects interstate commerce.

In this case, Petitioner, through Respondent's sales as exclusive distributor, had shipped from Florida a number of patented items to points throughout several states, including Texas. Title passed from each sale from Petitioner to Respondent and then to the ultimate vendee. When Respondent refused to pay for the items, Petitioner sought to enforce its sale price in the Texas Courts which refused such remedy. Such action by Texas effectively blocks further sales or shipments from Florida to the other states under the arrangement between Petitioner and Resopndent; obviously a material and direct interference on interstate commerce.

The instant situation is similar to the interference and burden on interstate commerce that was struck down in *City of Altus, Oklahoma v. Carr,* 255 F. Supp. 828, aff'd 385 U.S. 35. In that case, the State of Texas attempted, by statute, to prohibit the withdrawal and transportation of underground water from Texas to Oklahoma. This Court affirmed the Federal District Court in Texas which held such statute to be an unreasonable burden on interstate commerce and decreed such statute void and unconstitutional.

Indeed, the instant fact situation goes much further than did the prohibited acts in *City of Altus.* The case now before us has Texas interfering with commerce that leads from Florida to other states without even coming into contact with Texas. Such far reaching effects of the Texas Courts are certainly not compatible with the traditional theories and interpretations of the Commerce clause.

Compare this case with the situation in *National Bellas Hess, Inc. v. Dept. of Revenue of Ill.*, 386 U.S. 753. In *Bellas Hess* there was a mail order business based in Kansas which did business in Illinois. The contacts with Illinois consisted of those produced by the mails and the common carriers bringing goods into Illinois. The Illinois attempted tax on such activities was struck down as an unreasonable burden on interstate commerce.

At least in the *Bellas Hess* case, the State of Illinois was attempting to put a burden on goods and activities *within the State of Illinois.* Not so in the instant case. Texas is attempting to cast the restrictions of its anti-trust statutes to a sale and shipment of goods from Florida to say, for example, Illinois. Such attempt is certainly impermissible.

2. There is no compelling interest in the State of Texas to justify the imposition of the burden on interstate commerce.

This Court has allowed some degree of state regulation of interstate commerce if the effects on interstate commerce are only incidental, unless the burden imposed on such commerce is clearly excessive "in relation to the putative local benefits." *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142; *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440.

In the *Pike* case, this Court struck down an Order of Arizona which required a shipper of cantaloupes to pack fruit in a certain manner before the shipper could transport the cantaloupes to his own packing shed in California a few miles away. Such requirement by Arizona would have required the shipper to construct a $200,000 packing plant in Arizona. This Court stated:

> But the State's tenuous interest in having the company's cantaloupes identified as originating in Arizona cannot constitutionally justify the requirement that the company build and operate an unneeded $200,000 packing plant in the State. The nature of that burden is, constitutionally, more significant than its extent.

In the instant case, it is submitted that whatever local benefits may be obtained by the enforcement of the Texas anti-trust laws are far outweighed by the damage that such enforcement inflicts upon interstate commerce from Florida to other states.

Even though the Texas enforcement of its anti-trust law herein does not apparently impose a rigidity of re-

strictions on an entire industry, it does severely bind Petitioner with respect to Petitioner's interstate trade. Such an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved. *Pike v. Bruce Church, Inc.*, at 146, *Supra*. Here as in *Pike* the interest of the State of Texas is minimal at best.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the orders of the Texas Supreme Court.

Resepctfully submitted,

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APPENDIX A

Affirmed in part, and Reversed and Rendered in part, and Opinion filed April 20, 1977.

NO. 1552

M.I.I., also known as MARKETERS INTERNATIONAL, INC., ET AL,
Appellants

v.

E.F.I., INC., Appellee

Appeal from 127th District Court
of Harris County

This is an appeal from a judgment for plaintiff in a contract action, alleging the contract upon which plaintiff sued is unenforceable under the Texas antitrust laws. This is the second appeal in this case.

Appellee E.F.I., Inc. is a Florida corporation manufacturing electronic equipment on which it holds U.S. patents. On May 13th, 1968 George A. Harris, president of E.F.I., wrote to W. V. Womack, Jr., outlining

an exclusive dealership arrangement for the marketing of certain E.F.I. products. Womack replied, accepting the arrangement. Thereafter, to effectuate this agreement, appellant M.I.I., also known as Marketers International, Inc., was incorporated under Texas law, Womack and appellant George Levit each owning one-third of the corporate stock. On December 7, 1969 E.F.I. entered into an "Exclusive Dealer Agreement" with Marketers for the distribution of certain of its products. The contract provided in part:

> EFI does by this Agreement hereby appoint and does hereby designate Marketers to be the exclusive dealer and representative for the promotion, sale and distribution, in the territories as set forth and described in Appendix A, attached hereto and made a part hereof. The products covered by this Agreement are those listed in Appendix B, attached hereto.
>
> * * *
>
> 3. EFI agrees to sell all units to Marketers in accordance with the prices set forth in Appendix C, attached hereto.
>
> * * *
>
> 12. Cancellations of orders by Marketers' customers shall not constitute cancellation of any Marketers' orders to EFI.

Under an "Exclusive Distributor Agreement" dated August 4, 1970, Marketers was to become the sole distributor of certain E.F.I. products, subject to Marketers' purchase or orders tendered of designated quotas of units from E.F.I. It provided:

> 1. EFI does hereby authorize, appoint and designate Marketers to promote the sale of the products listed in Appendix "A" attached hereto and to be EFI's exclusive distributor in the United States, except for the Chicago, Illinois, area, as defined by DuPage, Lake, Cook and Will counties, for said products. . . .
>
> 2. EFI agrees to sell the products shown on Appendix "A" to Marketers in accordance with the prices set forth on Appendix "B" attached hereto.
>
> * * *
>
> 8. It is the intention of the parties to this agreement that Marketers shall at all times remain an independent contractor and shall do nothing to attempt in fact or create in the eyes of the public a partnership, principal-agent relationship, or employer-employee relationship with EFI.

Payment of Marketers' account due to E.F.I. was guaranteed unconditionally up to $100,000.00 by Levit and Womack, in an instrument executed March 21, 1969.

In December 1970 E.F.I. sued Marketers, Levit, and Womack for breach of the agreement. The defendants answered, alleging that the contracts violated the Texas antitrust laws and were thus invalid and unenforceable. The trial court granted a summary judgment for defendants based on their defense that the contracts were invalid. The Court of Civil Appeals for the First Supreme Judicial District reversed that judgment and remanded the case for trial. 492 S.W.2d 302. The court, at 305, held that if E.F.I.'s activities in Texas were only occasional and isolated and the contract was interstate as to

execution and performance, the federal antitrust laws should govern rather than those of Texas. The court said:

> It appears that in performing under the contract a considerable number of Marketers' sales and deliveries of merchandise would directly and necessarily relate to interstate commerce.
>
> * * *
>
> The record does not show to what extent the commerce affected was intrastate and thus subject to Texas law.

The court held that Marketers' summary judgment proof had not established "that the contract was intrastate as to performance or that the transactions contemplated by and carried out under the contract were essentially intrastate." The court also held an issue of disputed fact existed as to the question of whether the guarantee of Levit and Womack was executed prior to and was independent of the contracts. In a per curiam opinion, the Supreme Court of Texas refused Marketers' application for writ of error, no reversible error. 506 S.W.2d 579.

On remand, the case was tried before a jury and submitted on 51 special issues. The jury found, *inter alia,* that: (1) Marketers owed E.F.I. $27,269.80; (2) E.F.I. granted Marketers an exclusive distributorship for the sale of its products for an area including Texas under the December 1969 contract and August 1970 contract but not under the May 1968 letter agreement; (3) the letter agreement and the two contracts contemplated Marketers would serve as an exclusive distributor for

the sale of E.F.I. products in an area including Texas; (4) the personal obligation of Levit and Womack to pay for E.F.I. products was part of the consideration for the May 1968 letter agreement; (5) the March 1969 guarantee agreement of Levit and Womack was part of the consideration for the December 1969 and August 1970 contracts; (6) the activities of E.F.I. in Texas were more than occassional and isolated; and (7) Marketers' sales of E.F.I. products were made 10 percent in Texas and 90 percent outside of Texas. Based upon this verdict, the court entered judgment that E.F.I. recover from Marketers, Levit, and Womack, jointly and severally, the sum of $27,269.80, plus interest and costs.

Womack has not appealed from that judgment. Marketers and Levit appeal on seven points of error. Points one, two, and three complain of the court's error in overruling Marketers' motion for judgment and granting E.F.I.'s motion for judgment because the agreements to grant Marketers an exclusive dealership of E.F.I.'s products in Texas were in violation of the Texas antitrust laws and thus void and unenforceable. Points four through seven assert that it was error to enter judgment against Levit because his personal obligation to pay for products sold by E.F.I. to Marketers was part of the consideration for the May 1968 letter agreement, his guarantee agreement was part of the consideration for the contracts of December 1969 and August 1970, and these agreements were in violation of the Texas antitrust laws and are thus void and unenforceable. We sustain these points.

Section 15.02(b) of the Texas Business and Commerce Code Annotated (1968) defines a trust as:

a combination of capital, skill, or acts by two or more persons to

(1) restrict, or tend to restrict, trade, commerce, aids to commerce, the preparation of tangible personal property for market or transportation, or the free pursuit of a lawful business; or

* * *

(3) prevent or lessen competition in

(A) the manufacture, transportation, sale, or purchase of tangible personal property. . . .

Section 15.04 of the Code declares illegal and prohibits every trust defined in section 15.02, and provides that every agreement violating the prohibition against trusts is void and unenforceable in law or equity.

The agreements on their faces show a combination of capital, skill, and acts by the parties to restrict trade and commerce, and to prevent competition in the sale of tangible personal property. It is undisputed that the contracts made Marketers the exclusive distributor for certain E.F.I. products. As to those products, E.F.I. was limited to one distributor in Texas as well as almost all of the rest of the United States.

An agreement between a foreign supplier and a Texas distributor which gives the distributor exclusive sales rights within a territory in Texas is unenforceable. *Sherrard v. After Hours, Inc.*, 464 S.W.2d 87, 89 (Tex. Sup. 1971); *Climatic Air Distrib. v. Climatic Air Sales,* 162 Tex. 237, 241, 345 S.W.2d 702, 704 (1961).

The finding of the jury that 10 percent of Marketers' sales of E.F.I. products were made in Texas and 90 percent were made outside of Texas shows that the agreement had a direct relation to interstate commerce. But simply because inter-state commerce may be affected, the courts of Texas are not prohibited from giving effect to its antitrust laws. *Standard Oil Co. v. Tennessee,* 217 U.S. 413, 30 S.Ct. 543, 54 L.Ed. 817 (1909); *Gulf, C. & S.F. Ry. v. State,* 72 Tex. 404, 413, 10 S.W. 81, 85 (1888); *Elray, Inc. v. Catholic Protection Serv.,* 507 S.W.2d 570, 573 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ); *State v. Southeast Tex. Chap. Nat'l Elec. Contractors Ass'n,* 358 S.W.2d 711, 714 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.), *cert. denied,* 372 U.S. 969, 83 S.Ct. 1094, 10 L.Ed.2d 131 (1963).

In its previous review of this case, the supreme court directed the courts on remand to consider the question of whether this contract, which violates the public policy of Texas, may be enforced in the state's courts. 506 S.W.2d at 580. The court said it was reserving that question because "state courts ordinarily will not enforce rights existing under laws of other jurisdictions when to do so would violate the public policy expressed in the statutes of the state of the forum." *Griffin v. McCoach,* 313 U.S. 498, 61 S.Ct. 1023, 85 L.Ed. 1481 (1941); *Bothwell v. Buckbee-Mears Co.,* 275 U.S. 274, 48 S.Ct. 124, 72 L.Ed. 277 (1927); *Byrd v. Crazy Water Co.,* 140 S.W.2d 334 (Tex. Civ. App.—Dallas 1940, no writ).

We find this case falls within the rule annonuced by the court. The contract called for performances in violation of our local antitrust laws. The courts of Texas

will not enforce such contracts, regardless of their validity in another state. *Byrd v. Crazy Water Co., supra,* at 336; *J. R. Watkins Co. v. McMullan,* 6 S.W.2d 823, 824 (Tex. Civ. App.—Austin 1928, no writ). The Supreme Court of the United States has held this position to be within the constitutional power of the Texas courts. *Griffin v. McCoach, supra,* at 506, 61 S.Ct. at 1027, 85 L.Ed. at 1486.

Appellee presents two counter-points. In its first counter-point, it asserts the Texas antitrust laws are not applicable to this transaction because it had a patent on the goods which were the subject of the sale and that the patent owner had the exclusive sales rights to the product which it could grant to Marketers. The First Court of Civil Appeals dealt with this question in its previous opinion. It held that while a patentee may impose restrictions upon the assignee of the patent, it cannot impose restrictions upon one who buys an already manufactured article. 492 S.W.2d at 306-07. The point is overruled.

The second counter-point asserts that Marketers was not entitled to any offset against its account owing to E.F.I. In view of our disposition of the case, we find it unnecessary to determine this question.

The judgment of the trial court is reversed, and judgment is rendered that appellee E.F.I., Inc. take nothing by its suit against appellants M.I.I. and George Levit. The judgment as to W. V. Womack is affirmed.

/s/ George E. Cire
Associate Justice

Judgment rendered, and Opinion filed April 20, 1977.

APPENDIX B

JUDGMENT

NO. 1552

M.I.I., ALSO KNOWN AS MARKETERS INTERNATIONAL, INC., ET AL

v.

E.F.I., INC.

"This cause, being an appeal from the judgment rendered and entered by the court below on August 19, 1976, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was error in the judgment inasmuch as the contract involved called for performance in violation of our local antitrust laws, it is therefore considered, adjudged and ordered that the judgment of the court as to defendants/appellants, M.I.I., also known as Marketers International Incorporated, and George Levit, be reversed and this Court here now proceeds to render judgment that plaintiff/appellee, E.F.I., Inc., do have and recover nothing by its suit against defendants/appellants, M.I.I., also known as Marketers International Incorporated, and George Levit.

"And because it is further the opinion of this Court that inasmuch as defendant, Victor Womack, has not perfected an appeal, it is therefore considered, adjudged and ordered that the judgment of the court below as to defendant, Victor Womack, be and is affirmed in all things.

"It is further ordered that the appellee, E.F.I., Inc., pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance."

APPENDIX C

IN THE SUPREME COURT OF TEXAS

E.F.I., Petitioner

v.

MARKETERS INTERNATIONAL, INC.,
et al, Respondent

PETITION FOR WRIT OF ERROR ON BEHALF OF E.F.I., INC., APPELLEE IN CAUSE NO. 1552, FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS, WHEREIN MARKETERS INTERNATIONAL, INC., ET AL WERE APPELLANTS AND E.F.I., INC. WAS APPELLEE.

POINTS OF ERROR

1. The Court of Civil Appeals erred in holding that the contracts involved in the case at bar were violative of the prohibition against trusts and, therefore, void and unenforceable notwithstanding the fact that the contracts in question pertained to patented devices.

2. The Court of Civil Appeals erred in holding that the patentee's rights to impose restrictions on its assignee did not apply where it concerned an already manufactured article.

3. The Court of Civil Appeals erred in holding that the interstate commerce feature of the business between the parties did not bar Texas Courts from applying the Texas Anti-Trust Laws prohibition against assistance of the purported violator.

4. The Court of Civil Appeals erred in holding that contracts, which involve both interstate and intrastate transactions, which are contrary to the provisions of the Texas Anti-Trust Law will not be enforced by the Texas Courts.

5. The Court of Civil Appeals erred in holding that the guaranty of George Levitt was unenforceable because it was in violation of the Texas Anti-Trust Law.

6. The Court of Civil Appeals erred in failing to pass on the Counterpoints asserted by the Petitioner (Appellee in said Court), with regard to Petitioner's suit on a sworn account.

APPENDIX D

IN THE SUPREME COURT OF TEXAS

NO. B-6845

November 16, 1977

E. F. I., Inc.

v.

M. I. I., also known as Marketers International, Inc., et al.

From Harris County, Fourteenth District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Fourteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, E. F. I., Inc. pay all costs incurred on this application.

D-2

NO. B-6845

December 14, 1977

E. F. I., Inc.

v.

M. I. I., also known as Marketers International, Inc., et al.

From Harris County, Fourteenth District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 14th day of DECEMBER, 1977.

GARSON R. JACKSON, Clerk

By /s/ JUDITH E. SULLIVAN, Deputy
Judith E. Sullivan